



**IN THE SUPREME COURT OF BERMUDA
DIVORCE JURISDICTION
2005: No. 1**

BETWEEN:

E.F.

Petitioner

and

J.F.

Respondent

Mr. J. A .L Peniston, Peniston & Associates, for the Petitioner
Ms. Karen Lomas, Lomas & Co., for the Respondent

JUDGMENT

- 1 In his application for ancillary relief, filed on the 11th August 2005, the husband seeks periodic payments, together with a lump sum provision and such property adjustment orders, as are equitable, in respect of the former matrimonial home, which consists of a three (3) apartment dwelling house situated at 40 Happy Valley Road in Pembroke and the adjacent subdivided lot of land.
2. The parties were married on the 4th day September, 1999.
3. There are two (2) children of the family, J who was born on the 6th September 1995, and R who was born on the 3rd October, 2002. R has been diagnosed with cystic fibrosis.
4. The wife was previously married and J is a child of that union. The wife divorced J's father, who subsequently died. She married the Respondent and R is a child of this marriage. Some time during the marriage the husband formally adopted J. Eventually, this marriage also collapsed and the parties were separated. A Decree Nisi was granted on the 24th June, 2005 and made absolute on 16th June, 2006. The marriage lasted 5½ years.

5. In June 2005, the wife was awarded care and control of the two children by consent of the husband who left to reside overseas after dissolution of the marriage. There is currently an application before the court on the part of the husband, in which he seeks an Order granting him care, control and allowing him to remove the two children of the family permanently from Bermuda. Since the Magistrates' Court Order, made in 2004 setting out the children's maintenance, the husband has consistently paid four hundred dollars (\$400) per month for this purpose, until the Order was suspended in March 2007.
6. The Department of Family Services has been involved with this family. In December 2006 the children were taken into care. In March 2007 the Care Order was extended for 6 months which means that, at present, both children currently remain the subject of it. The Court understands that the Department will be seeking a contribution from both parents for the children's maintenance. This matter is before the Magistrates' Court.
7. The husband is a retired police officer and his sole source of income is his monthly police pension in the amount of one thousand, one hundred and eighty dollars (\$1,180). The wife worked as a secretary, but was suspended from her job without pay from June 2004 to February 2007 when she was reinstated but placed on probation.
8. In his affidavit, dated 8th March 2007, the husband said that for the past several months he has been living in Ecuador and that he has a four month old son with an Ecuadorian woman with whom he has been living and who he intends to marry. The Ecuadorian woman has four (4) other children for whom he says he will be taking some financial responsibility.
9. Family Assets

The family assets consist of the following:

- a. a former matrimonial home which consists of a three (3) apartment dwelling at 40 Happy Valley Road valued at eight hundred and seventy-five thousand dollars (\$875,000). This house was purchased for three hundred and eighty-five thousand dollars (\$385,000), financed with a mortgage. As a non-Bermudian the husband was unable to hold title to Bermudian real estate. The mortgage was executed by the wife as owner of the property and by the husband as the guarantor, the parties resided together in this home until they separated. The house has increased in value over time. However, the balance of the mortgage has been reduced minimally. The liability against the home is four hundred and forty-one thousand, five hundred and sixty-four dollars and fifty-five cents (\$441,564.55), leaving a net value of four hundred and thirty thousand, four hundred and thirty-five dollars and forty-five cents (\$430,435.45).
- b. a lot of land adjacent to the matrimonial home which was purchased for eighty thousand dollars (\$80,000) and now valued at three hundred and twenty-five thousand dollars (\$325,000). The parties have agreed that this lot be sold. The proceeds of sale of three hundred and one thousand, five hundred and thirty-eight dollars and twenty-four cents (\$301,538.24) are being held in escrow.

- c. a lot of land in Canada which was purchased by the husband before the marriage for thirty-nine thousand Canadian dollars (CA\$39,000). The agreed value of this land is Bermudian twenty-seven thousand and three hundred dollars (\$27,300). The husband and wife have debts totaling twenty-eight thousand, nine hundred and forty-nine thousand dollars and eighty-six cents (\$28,949.86) and sixty-three thousand, five hundred and nine thousand dollars (\$63,509) respectively. The sixty-three thousand, five hundred and nine dollars (\$63,509) in the main is made up of mortgage arrears – thirteen thousand, nine hundred and seventy-three (\$13,973), legal fees – forty-five thousand, and fifty-seven dollars and twelve cents (\$45,057.12), house insurance – two thousand, one hundred and sixty-dollars (\$2,160) and land tax – of four hundred and eighty-one dollars and twenty-one cents (\$481.21).
10. Ms. Lomas, Counsel for the husband, submitted that the husband is now looking for a 50-50 split of the assets. Ms. Lomas said that nobody can take away the fact that the wife had the ‘agonizing job’ of caring for the children. She accepts that since the separation, the wife has had a considerable burden bringing up the children with minimal assistance from the husband.
11. Mr. Peniston, Counsel for the wife, agrees that there should be a clean break. However, he maintains that a portion of the husband’s award should be held back, to secure continued maintenance payments for the children. One of the issues before this Court is whether it should hold back a portion of the husband’s award as secured maintenance payment for the children. Having considered Counsel’s submission the Court finds that it will be inappropriate to make any such Order in these circumstances.
12. In dealing with the distribution of the family assets, the Court must be guided by the principles laid down by Section 29 of the Matrimonial Causes Act 1974 and precedent.
13. In *Miller v Miller: McFarlane* (2006) UK HL 24 (2006) 1FLR 1186, House of Lords, 26 May, 2006 relied on in the decision of *Edwina Arthur Daniels v. Teresa Faith Daniels* Supreme Court of Bermuda, *Divorce Jurisdiction* 2005/1, page 8 it was reiterated that the search is always for what are the requirements of fairness in a particular case.
14. The Court is enjoined by s29 of the Matrimonial Causes Act that when considering an application of this nature it should have regard to how it should exercise those powers. I have taken all the factors required of me together with relevant precedent into account. In *Miller supra*, when parties live and work together and the partnership ends, each is entitled to an equal share of the assets of the partnership, unless there are good reasons to the contrary. This yardstick of equality is to be applied as an aid not as a rule.
15. The Court is satisfied on the evidence that the children are in care. There are a number of issues arising from this situation among them the long term future of these children. Currently the Order requiring the husband to contribute to the children’s maintenance is suspended. Ms. Karen Lomas has asked the Court to look at 3 scenarios when contemplating the distribution of the property. The first, if the mother is granted care and control of the two children. The second, if the father is granted care and control of the children and they are allowed to leave the jurisdiction. The third, if care and control of the children is split, that is, mother is granted care and control of one child and the father care and control of the other and is allowed to remove the child from the jurisdiction.

16. Irrespective of the fact that the mortgage payments are in arrears, the Court is satisfied that, during the husband's absence from Bermuda, the wife with the help of her father did what she could, including making necessary financial arrangements with the bank to preserve this asset, 40 Happy Valley Road, so as to maintain a roof over her and the children's head, and to care for them. The wife's suspension from her job for two years made the situation more difficult. It must have been, to use Ms. Lomas' term, 'agonizing'. For his part the husband made the purchase of the asset possible by being a guarantor.
17. In so far as the husband's position is concerned, his state of affairs with his Ecuadorian partner is far from settled. I do not accept that he has been completely frank with the Court regarding his present financial state. I do not find his evidence believable when he said that his income is limited to his monthly pension. However, he is entitled to his fair share of the matrimonial assets. He says that he awaits his personal settlement to place some order in this new aspect of his life.
18. How should the Court distribute the assets? It is vital that the parties each have a home to exercise care and control over the children. The child R has a long term disability that will require care for years to come. The former matrimonial home should be preserved to enable the Petitioner to accommodate the children irrespective of whether she receives custody, care and control or reasonable and generous access of the two children of the family. If the mortgage arrears are paid off, plus the wife's other outstanding debt, she should be able to meet her ongoing mortgage payments from the income of the two apartments. The banks have excellent long term mortgages which would help to reduce the monthly mortgage payments and give the wife a small surplus to meet other contingencies. I would, therefore, order the wife to receive the sum of one hundred thousand dollars (\$100,000) from the funds sitting in escrow. The husband should receive the balance of the funds sitting in escrow and retain the Canadian property. As regard the second scenario put forward by Mrs. Lomas namely if custody care and control is awarded to the husband. As I understand it, from Counsel, the cost of living in Ecuador, in particular the housing cost is not as high as it is in Bermuda.
19. The distribution of the assets in this way will allow the husband ample funds to buy a home to accommodate his new family and the children of the family in the event he is granted custody, care and control and is allowed to remove the children from the jurisdiction. He should also have a small surplus to take care of other contingencies. He will continue to receive his pension and once he is married should be able to find full-time employment.
20. In so far, as the third scenario, i.e. the Petitioner is granted custody, care and control of one child and the Respondent the other. I am of the view the Order proposed in paragraph 18 will accommodate this. Mr. Peniston submitted that the Department of Child and Family Services (the Department) is in the process of reintroducing the child R to her mother and will be trying to elevate the contact with the mother. In fact, Madam Registrar of the Supreme Court received a letter dated 8th June 2007 from the Department which in part reads:

“...the Department...is actively engaged in the process of reuniting [Mrs. F] with her daughter, R. R. is also within our foster care programme and it is our opinion that strengthening the maternal bond between mother and daughter is strongly indicated at this time. [Mrs. F] will be closely supervised and assessed during this process.

A case conference with Child and Adolescent Services will be scheduled in the very near future to map out a long term treatment plan for both children.

Via email [Mr. F] reported that he had been advised by a lawyer to get married and to register his son before making contact with the Child and Adolescent Services in Cuento. [Mr. F] shared his reasoning was twofold. (1) to unequivocally establish his rights of residency in Ecuador; and (2) as Glenda (his wife as of the 18th May 2007) would be acting in effect as a surrogate mother, her full legal wife status would add weight to any report."

In summary the Department of Child and Family Services will not be able to render any recommendation on [Mr. F's] application for sole custody of the children until such time as we are in receipt of a home assessment from a professionally recognized agency. Secondly, we need to have sufficient time to assess [Mrs. F's] relationship with her daughter over time in order to develop a comprehensive treatment plan for both children in conjunction with Child and Adolescent Services."

21. Ms. Lomas suggests that the legal fees of forty thousand dollars (\$45,000) are grossly excessive and should be viewed with some skepticism. On the face of it, the legal fees the wife claims to have incurred seem to be on the high side. Given the wife's dire circumstances, in the interest of fairness, the Court suggest to Counsel that he should consider a reduction in the bill. In any event the wife should have the bill taxed, if the sum is not agreed.

Before final Judgment was rendered Mr. Peniston undertook to reduce the wife's legal fees by ten thousand dollars (\$10,000) and to continue to represent the wife to the conclusion of this matter without any further charge. Further to the Court's request Ms. Lomas informed the Court that the balance owed to Lomas and Company was twelve thousand, two hundred and twenty-two dollars and thirty-seven cents (\$12,222.37) and Legal Aid cost incurred to this point amounts to nineteen thousand, seven hundred and forty-six dollars and ninety-two cents (\$19,746.92).

22. Having regard to the various submissions, each party should bear his own costs.
23. I invite Counsel to prepare an agreed Order, if possible, setting out these terms for the Court's approval.

Dated this 5th day July 2007.

**The Hon. Mrs. Norma Wade-Miller
Puisne Judge**